

MEMORANDUM

From: Donald D. Campbell¹

To: Chief Justice Maura D. Corrigan, Michigan Supreme Court and Justices of the Michigan Supreme Court

Re: Michigan Supreme Court Administrative Order 2002-29, Recommended Michigan Standards for Imposing Lawyer Sanctions

Background

Three years ago the Court announced the adoption of the ABA Standards for Imposing Lawyer Sanctions on an interim basis. Specifically the Court said,

Today, we direct the Michigan Attorney Discipline Board and hearing panels to follow the ABA Standards for Imposing Lawyer Sanctions when determining the appropriate sanction for lawyer misconduct. We have historically utilized an *ad hoc* approach to determine the appropriate sanction after a finding of professional misconduct. A comprehensive set of written standards for imposing sanctions has never existed in this state. Only our occasional opinion has provided guidance to the public, the disciplinary body, and the legal profession on this subject. We conclude that written standards are needed to guide the Board and hearing panels. *Grievance Administrator v Lopatin*, 462 Mich 235 (2000).

In *Lopatin*, the Court directed the Board to submit a proposal concerning permanent Michigan Standards. The Court said,

We direct the Board to explore the development of permanent Michigan standards for imposing lawyer sanctions. The Board shall report its proposed Michigan standards to this Court within two years of the date of this opinion. *Lopatin*, at 238 n1.

In the summer of 2002, the Court received two submissions for consideration.

On July 15, 2003 the Court issued Administrative Order 2002-29. The order set

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forth the Proposed Michigan Standards for Imposing Lawyer Sanctions. The proposal is different from the ABA Standards in several significant ways.

1. The proposed Michigan Standards provide a framework for determining sanctions for virtually every violation set forth in the Michigan Rules of Professional Conduct (MRPC), including incivility;
2. The proposed Michigan Standards use terms and language that is consistent with terminology adopted in the MRPC; and,
3. The proposed Michigan Standards treat the question of injury and its degree as a factor to weigh in aggravation and mitigation rather than as an element of an offense.

The Court's Proposal Michigan Standards present alternatives for select Standards.

This memorandum is in response to the Court's request for input regarding which alternative Standards would best serve the bench, the bar and the public.

Below is a brief discussion of specific Standards and their respective alternative proposals offered in AO 2002-29.

I. Standards 4.63, 5.23, 6.13 and 6.23

A number of MRPC require "actual knowledge" as an element of a disciplinary offense.² Despite the fact that "actual knowledge" is required to prove the offense, several ABA Standards include provisions that would discipline negligent violations of the rule.

In the above noted four Proposed Michigan Standards the Court provides a choice between retaining the ABA's approach (addressing negligent violations where "actual knowledge" is required as an element) and adopting language that is more consistent with the MRPC (deleting any reference to negligent conduct and noting that absent mitigation a violation committed with "actual knowledge" should generally not result in a reprimand).

Standard 6.13 is one example of where the Court has presented such a choice.

Standard 6.1 is designed to address violations of Michigan Rule of Professional Conduct 3.3(a). MRPC 3.3(a)(1)-(4) states:

² In the terminology section of MRPC 1.0 it states:
"Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from the circumstances.

- (a) a lawyer shall not **knowingly**:
- (1) make a false statement of material fact or law to a tribunal;
 - (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client;
 - (3) fail to disclose to a tribunal controlling legal authority in the jurisdiction **known** to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or,
 - (4) offer evidence the lawyer **knows** to be false.

If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures. [Emphasis added].

Proposal A defines the conduct that should merit a reprimand, in the following manner:

6.1 False Statements, Fraud, and Misrepresentation to a Tribunal

The following sanctions are generally appropriate in cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a tribunal:

* * *

6.13 Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents submitted to a tribunal are false or in taking remedial action when material information is being withheld.

This proposed language is virtually identical to the language employed in the ABA Standards. However, as noted above, MRPC 3.3(a) plainly prohibits only conduct that is done with “actual knowledge”. The basis for Proposal A’s recommendation of a reprimand is not explained in either the ABA Standards or ADB’s proposed standards.³

³ While it is not clear, it is very likely that the ABA Standards provide disciplinary sanctions for “negligent” conduct where “actual knowledge” is required by the ABA Model Rules because the drafters of the ABA Standards were themselves heavily influenced by the old Model Code. The ABA Standards were created by examining cases between 1974 and 1984, exclusively. (See ABA Standards p. 2 Methodology). The ABA Model Rules for Professional Responsibility were not adopted by the ABA House of Delegates until 1983. The MRPC were adopted in Michigan, one of the first states to adopt a version of the Model Rules, in 1985.

Proposal B reads:

6.1 False Statements, Fraud, and Misrepresentation to a Tribunal

The following sanctions are generally appropriate in cases involving conduct that involves dishonesty, fraud, deceit, or misrepresentation to a tribunal in violation of MRPC 3.3.

* * *

6.13 Reprimand is generally not appropriate when a lawyer engages in conduct that involves dishonesty, fraud, deceit or misrepresentation to a tribunal.

Proposal B, consistent with Rule 3.3(a), would make it clear that: 1) incorrect statements that are negligently made are not misconduct and cannot be grounds for discipline; and, 2) that there is no strict liability for a lawyer who offer evidence that turns out to be inaccurate.

In my opinion, Proposal B for the reasons cited above is preferable and should be adopted by the Court.

In three other Proposed Michigan Standards the Court presents a similar choice between alternatives. Specifically, in Standards 4.63, 5.23 and 6.23 the Court provides alternative proposals that mirror the choices discussed above. In each of these Standards, one proposal provides a sanction for negligent conduct, although the MRPC only outlaws conduct that is done with “actual knowledge”. The other proposal sets forth the simple and direct statement that absent mitigating factors a reprimand is not generally appropriate for the violation of the applicable MRPC(s).

Like with Standard 6.13, the alternative that is faithful to the MRPC’s prohibition of conduct containing the element of “actual knowledge” should be adopted by the Court in Standards 4.63, 5.23, and 6.23.

II. Standard 5.13

As noted above, most of the Court’s alternatives provide a “choice” between the ABA Standards capturing of “negligent” conduct and the alternative of tailoring the Standard to the MRPC. However, in Standard 5.13 the Court’s proposed Michigan Standard’s set forth alternative proposals that center on a different set of issues.

The proposals for Standard 5.13 are:

Proposal A reads:

5.1 Failure to Maintain Personal Integrity

The following sanctions are generally appropriate: (a) in cases involving commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects; (b) in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation; or (c) in cases involving the improper handling of property entrusted to a lawyer.

5.13 Reprimand is generally appropriate when:

- (a) a lawyer engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that reflects adversely on the lawyer's fitness to practice; or
- (b) a lawyer engages in any conduct that involves dishonesty, fraud, deceit, or knowing misrepresentation and that adversely reflects on the lawyer's fitness to practice law to a slight degree; or
- (c) a lawyer engages in an isolated instance of simple negligence in dealing with the property of another entrusted to the lawyer and causes little or no injury or potential injury.

Proposal B reads:

5.1 Failure to Maintain Personal Integrity

The following sanctions are generally appropriate in cases involving conduct in violation of MCR 9.104(A)(5) and MRPC 3.5(c); 4.1; 6.5; and, 8.4(b).

5.13 Reprimand is generally appropriate when a lawyer engages in criminal conduct that does not contain the elements listed in Standard 5.11.

Proposal A cannot be adopted without substantial revisions to other Standards. As presented it overlaps with two other proposed Michigan Standards. Specifically, conduct described in Proposal A's 5.13(c) is addressed already under Standard 4.13⁴ and the conduct described in Proposal A's 5.13(a) is treated under Standard 5.12(a).⁵

In fact, it is Proposal A's 5.13(b) that is the crux of the recommendation. The "to a slight degree" language is taken directly from the ADB's submission. This language does not appear in the ABA Standards. In the ADB's "Drafting Notes" there is no explanation of where "to a slight degree" originates or how it would work in practice. Proposal A reflects the ADB's belief that some degree of adverse reflection upon the lawyer's fitness to practice law must be proven to merit a sanction. In *Grievance Administrator v Deutch and Howell*, 455 Mich 149, (1997) the Court overruled the ADB and held that violation of a criminal law is misconduct and could be grounds for discipline even where the criminal conduct did not adversely reflect upon the lawyer's

⁴ 4.13 Reprimand is generally appropriate when a lawyer, in an isolated instance, negligently fails to preserve property in trust.

⁵ 5.12 Suspension is generally appropriate when:
(a) a lawyer engages in criminal conduct which does not contain the elements listed in Standard 5.11 but which nevertheless adversely reflects on the lawyer's fitness to practice

fitness to practice law. In its ruling the Court relied upon MCR 9.104(A)(5).⁶ The ADB's Standards did not address violations of MCR 9.104(A)(5) and did not provide any sanction for a violation of a criminal law where there was no showing that the conduct adversely reflected upon the lawyers fitness to practice.

The Court's Proposal B to Standard 5.13 does provide sanctions for violations of MCR 9.104(A)(5).

I recommend that Proposal B be clarified by the addition of the bolded clause below:

Reprimand is generally appropriate when a lawyer engages in criminal conduct that **does not adversely reflect on a lawyers' fitness to practice law** and does not contain the elements listed in Standard 5.11.

In my opinion, Proposal B, with the added language, is the preferred Standard.

III. Standards 4.4 and 4.5

The third area where the Court has provided a choice between alternatives involves the issue of imposing sanctions for incompetence, lack of diligence and neglect.

The respective proposals read, as follows:

Proposal A reads:

4.4 Lack of Diligence

The following sanctions are generally appropriate in cases involving a failure to act with reasonable diligence and promptness in representing a client

- 4.41 Disbarment is generally appropriate when:
- (a) a lawyer abandons the practice of law; or
 - (b) a lawyer knowingly fails to perform services for a client; or
 - (c) a lawyer engages in a pattern of neglect with respect to client matters.

- 4.42 Suspension is generally appropriate when:
- (a) a lawyer knowingly fails to perform services for a client; or
 - (b) a lawyer engages in a pattern of neglect.

Proposal B reads:

4.4 Lack of Diligence

The following sanctions are generally appropriate in cases involving a failure to act with reasonable diligence and promptness in representing a client in violation of MRPC 1.1(a)-(c); 1.2(a) and (b); 1.3; and, 1.4:

- 4.41 Disbarment is generally appropriate when:
- (a) a lawyer abandons
 - (b) the practice of law; or
 - (b) a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures.

- 4.42 Suspension is generally appropriate when:
- (a) a lawyer knowingly fails to perform services for a client in a reasonably diligent and prompt manner;
 - (b) a lawyer engages in a pattern of neglect; or,

⁶ MCR 9.104(A)(5) states that "conduct which violates the criminal law of any state or of the United States" is misconduct and may be subject to discipline. Unlike the ABA Model Rule 8.4(b), MCR 9.104(A)(5)'s prohibition applies regardless of whether the conduct reflects adversely on the lawyers' fitness to practice. MCR 9.104(A)(5) states that "conduct which violates the criminal law of any state or of the United States" is misconduct and may be subject to discipline.

(c) a lawyer handles a matter that the lawyer knows or should know that the lawyer is not competent to handle.

4.43 Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client.

4.43 Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client or handles a matter without preparation adequate in the circumstances.

4.5 Lack of Competence

The following sanctions are generally appropriate in cases involving failure to provide competent representation to a client:

4.5 Charging Illegal or Clearly Excessive Fees

The following sanctions are generally appropriate in cases involving the charging of an illegal or clearly excessive fee in violation of MRPC 1.5:

4.51 Disbarment is generally appropriate when a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures.

4.51 Disbarment is not generally appropriate when a lawyer charges or collects a clearly excessive fee absent the presence of significant factors in aggravation.

4.52 Suspension is generally appropriate when a lawyer knowingly fails to provide competent representation.

4.52 Suspension is generally appropriate when a lawyer knowingly charges or collects a clearly excessive fee.

4.53 Reprimand is generally appropriate when a lawyer:

- (a) demonstrates failure to understand relevant legal doctrines or procedures; or
- (b) negligently fails to provide competent representation.

4.53 Reprimand is generally appropriate when a lawyer negligently charges or collects a clearly excessive fee.

Proposal B captures Proposal A's recommendations in a single Standard 4.4. In Proposal B the related violations of incompetence, diligence and neglect are addressed in a single standard. Proposal B also incorporates concepts and language from MRPC 1.1(a)-(c) which are absent from Proposal A. The absence of these concepts is again an outgrowth of the ADB's reliance upon the ABA Standards. Significantly, ABA Model Rule 1.1, is very different from our MRPC 1.1(a)-(c). Proposal A addresses the Model Rules' prohibitions, but does not adequately address the conduct prohibited by MRPC 1.1(a)-(c), only Proposal B accomplishes that.

Model Rule 1.1 states, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation."

While, our MRPC 1.1(a) states:

A lawyer shall provide competent representation to a client.
A lawyer shall not:

- (a) handle a legal matter which the lawyer **knows** or **should know** that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it (emphasis added);
- (b) handle a legal matter without preparation adequate

under the circumstances; or
(c) neglect a legal matter entrusted to the lawyer.

Our MRPC 1.1(a) prohibits a lawyer from handling a matter **either** when the lawyer (1) knows that she or he is incompetent or when the lawyer (2) should know that he or she is incompetent. Proposal A does not provide a clear standard for a lawyer who violates the “should have known” prong of MRPC 1.1(a) and would provide a sanction for a lawyer who “negligently” violates MRPC 1.1(a).

I recommend the adoption of Proposal B. Proposal B, while preferred to Proposal A, can and should be improved upon. For example, Standard 4.4 should be re-titled from “Lack of Diligence” to read “Lack of Competence, Lack of Diligence, and Neglect”. There are other wording and editing changes to Proposal B that can and should be adopted and they are set forth in detail in the attached proposal.

Finally, Proposal B’s Standard 4.5 is the only Proposed Michigan Standard that addresses the issue of sanctions for charging clearly excessive fees. Although the current ABA Standards divide violations of MRPC 1.5 into both Standard 4.6 (Lack of Candor to a Client) and 7.0 (Duty to the Public) the Court’s proposed versions of those respective standards do not address MRPC 1.5. Accordingly, the adoption of Proposal A would require the Court to also revise several other Standards or to create a new Standard to address the issue of illegal or clearly excessive fees.

CONCLUSION

Michigan’s disciplinary system needs a set of principles and guidelines that will ensure that sanctions are fair for the offending lawyer, consistent with discipline imposed upon other lawyers who committed similar offenses, and will provide predictability for both the parties and the appellate bodies. In my opinion, the proposals I have recommended above come closest to achieving these goals.